



STATE OF MAINE  
OFFICE OF THE GOVERNOR  
1 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0001

Paul R. LePage

GOVERNOR

January 23, 2015

Chief Justice Saufley  
Associate Justices of the Maine Supreme Judicial Court  
205 Newbury Street, Room 139  
Portland, Maine  
04101-4125

To the Honorable Justices of the Supreme Judicial Court:

Please accept my request for an Opinion of the Justices of the Maine Supreme Judicial Court pursuant to Article VI, Section 3 of the Maine Constitution. I seek your advice upon important questions of law regarding the proper constitutional responsibility and relationship between the Chief Executive and the Attorney General pursuant to Article V, Part First, Section 1, Article V, Part First, Section 12, and Article IX, Section 11 of the Maine Constitution, and 5 M.R.S. § 191.

Consistent with my duties, I have sought legal representation of state agencies by the Office of the Attorney General pursuant to 5 M.R.S. § 191. My questions arise in the face of the recent refusal by the Attorney General to represent a state agency in a lawsuit, an action which has led me to seriously doubt the actions I must take with respect to the Attorney General's assertion of authority over state litigation.

#### FACTUAL BACKGROUND

At issue is the legal representation refused by the Attorney General in the matter of *Mayhew v. Burwell*. Initially, this case was an administrative matter, a Medicaid State Plan Amendment ("SPA") request from the Maine Department of Health and Human Services ("Maine DHHS") to the United States Department of Health and Human Services ("U.S. DHHS"). In 2012, the Maine Legislature directed Maine DHHS to eliminate 19- and 20-year olds from Maine's Medicaid population, conditioned on Maine DHHS seeking and obtaining from U.S. DHHS an SPA making that change. *See* 2012 Me. Laws c. 657, § GG-1. Maine DHHS submitted the required SPA request to U.S. DHHS. The Office of the Attorney General, under Attorney General William Schneider, assisted Maine DHHS in that administrative case. The Office of the Attorney General also represented Maine DHHS with a related action in the U.S. Court of Appeals for the First Circuit, to force a timely answer from U.S. DHHS on the SPA request. The First Circuit denied that request as Maine DHHS had not yet exhausted its administrative remedies.

At that point, the Legislature elected Janet Mills to replace William Schneider as Attorney General. From that point forward, the Office of the Attorney General has refused to represent



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Maine DHHS in actions related to this SPA. The Attorney General refused to provide legal representation for the remainder of the administrative work before U.S. DHHS, leaving Maine DHHS to represent itself. In 2013, the U.S. DHHS denied Maine's SPA request. Maine DHHS petitioned for reconsideration, which was denied in January 2014. Intending to appeal the SPA denial to the First Circuit, Maine DHHS requested legal representation from the Office of the Attorney General, or outside counsel as an alternative. The Attorney General responded by refusing to provide representation because she concluded the matter was unlikely to succeed, but indicating she would consider authorization of outside counsel. A copy of the March 4, 2014 communication from the Attorney General is attached as Exhibit 1 for the Court's reference.<sup>1</sup>

In March 2014, the Attorney General authorized Maine DHHS's retention of outside counsel for the limited purpose of representation in the First Circuit appeal, and with a cap on legal fees. The money for the legal fees came from the Governor's discretionary account, not the budget of the Office of the Attorney General.

Using outside counsel, Maine DHHS filed its appeal of the SPA denial in *Mayhew v. Burwell*. After the appeal was filed, the Attorney General moved to intervene in the case to oppose Maine DHHS's position. The Attorney General was granted intervenor party status, and filed her brief in August 2014, in which she stated:

The Attorney General of Maine strongly disagrees with the State DHHS, as a matter of law and public policy, and for that reason declined to represent the State DHHS, authorized outside counsel for the Department and successfully moved to intervene to represent the public interest.

Brief of Interested Party-Intervenor Attorney General of Maine, *Mayhew v. Burwell*, Case No. 14-1300 (Aug. 6, 2014) at 3. The First Circuit denied the appeal in November 2014. The Executive Branch intends to petition the U.S. Supreme Court for a writ of *certiorari*, which it must do by mid-February. Maine DHHS communicated to the Attorney General that it wished to retain outside counsel for the purposes of filing the petition. Despite the Attorney General's participation as a party in outright opposition to Maine DHHS in *Mayhew v. Burwell*, the Office of the Attorney General requested that the Executive Branch provide copies of outside counsel's bills and the estimate for the cost to do the petition, from which the Attorney General's Office would consider the request for outside counsel, and develop a legal fee cap to impose on the Executive Branch for the work to be performed. Maine DHHS refused to provide privileged narrative billing records, but provided amounts budgeted and paid to outside counsel instead. Maine DHHS also argued against the propriety of a fee cap. In a January 14, 2015 letter, the Attorney General's Office approved the retention request (a copy of that letter is attached as Exhibit 2 for the Court's reference).

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<sup>1</sup> Where the Attorney General has declined representation to Maine DHHS in this instance, DHHS waives no attorney-client privilege through disclosure of the pieces of correspondence from the Attorney General that are provided herein. This disclosure does not constitute waiver of the privilege belonging to Maine DHHS in any other matter.

At this juncture, especially in light of the Attorney General's opposition to Maine DHHS in the SPA appeal, I seriously question whether I must submit to the Attorney General's direction over state litigation.

With great deference, I respectfully submit to you that these questions represent the "solemn occasion" and "important questions of law" necessary to invoke your constitutional authority to issue advisory opinions under Article VI, Section 3 of the Maine Constitution. According to a 1997 Opinion of the Justices, "a solemn occasion refers to an unusual exigency, such an exigency exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take action..." *Opinion of the Justices*, 709 A.2d 1183, 1184 (Me. 1997). I request that you assist me in finding the appropriate legal path.

### QUESTIONS

1. If the Attorney General refuses to represent a State agency (or any other entity listed in 5 M.R.S. § 191) in a lawsuit, must the Executive Branch still obtain the Attorney General's permission to hire outside counsel to represent the agency in the suit?

Presently, the Department is faced with deadlines for submitting its petition for *certiorari* in *Mayhew v. Burwell*. The Office of the Attorney General has consented to the retention of outside counsel for the limited purpose of generating a petition. The Attorney General's Office also has indicated that should a petition for *certiorari* be granted, Maine DHHS will have to return to obtain permission to retain outside counsel. Additionally, there is at least one other pending litigation matter in Cumberland County Superior Court, *Maine Municipal Association et al. v. Maine Department of Health and Human Services*, in which the Attorney General's Office has refused to represent Maine DHHS, and for which the Attorney General asserts Maine DHHS must continue at regular intervals to obtain permission to retain outside counsel.

I wish to know whether the Executive Branch may proceed with retaining outside counsel on its own terms in the absence of permission from the Attorney General. A requirement to request permission from the Attorney General implies that permission may be denied, which would leave the Executive Branch without legal representation and would deprive me, and the Executive Branch officers working at my direction, of the inherent and constitutional authority to carry out the policy priorities I set. I ask whether the Executive Branch may be left without representation or recourse to the courts to carry out Executive Branch policy priorities by a decision of the Attorney General, a constitutional officer chosen by the Legislature. May the Attorney General exercise *de facto* veto power over my differing assessment of the public interest, by prohibiting me from obtaining vindication from the courts of the public interest as I see it?

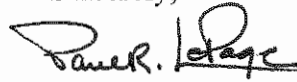
2. If the Attorney General intervenes to oppose a State agency in a lawsuit, must the Executive Branch still allow the Attorney General to direct that piece of litigation?

The Attorney General has intervened in *Mayhew v. Burwell* in order to oppose Maine DHHS. Especially in light of her status as an opposing party in the present case, it is my position that it is inappropriate for her to exercise control over this piece of state litigation. *Cf. Fitzgerald v.*

*Baxter State Park Auth.*, 385 A.2d 189 (Me. 1978). This is not a situation where the Office of the Attorney General can create a Chinese wall between various assistant attorneys general who are representing distinct interests. In the present case, the Attorney General herself has decided to participate as a party in a lawsuit, while claiming veto authority over whether and to what extent her opposing party obtains representation of counsel. She has sought to dictate who may represent the Executive Branch and even to cap the legal fees for that work, even though the payments do not come from her Office's budget. Her office has requested copies of privileged billing entries of the opposing party who paid the bills. I believe none of this is authorized when she is a party on the opposite side of a lawsuit the Executive Branch has deemed advisable in faithful execution of the directives of the Legislature and the policy judgments of the Executive Branch.

In light of the pressing deadline for filing a petition for a writ of *certiorari*, and the importance of proceeding in an unfettered fashion with obtaining appropriate outside legal counsel for that case as well as the *Maine Municipal Association* litigation, I request the Court provide its answers to these questions as promptly as the Court is able.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul R. LePage". The signature is stylized with a large, looped "P" and "L".

Governor Paul R. LePage